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**In the Supreme Court of the United States**

OCTOBER TERM, 1992

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UNITED STATES OF AMERICA AND  
FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

*v.*

BEACH COMMUNICATIONS, INC., ET AL.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

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REPLY BRIEF FOR THE PETITIONERS

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No. 92-603

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v.

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**REPLY BRIEF FOR THE PETITIONERS**

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Respondents<sup>1</sup> devote much of their brief to issues that are, at most, tangentially related to the question presented—whether Congress had a rational basis for distinguishing between facilities serving commonly owned, as opposed to separately owned, multiple-unit dwellings in defining the term “cable system.” 47

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<sup>1</sup> References in this brief to “respondents” and “Resp. Br.” encompass Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc., but not respondent National Cable Television Association, Inc., which has filed a brief in support of petitioners.

U.S.C. 522(6) (1988).<sup>2</sup> As discussed in our opening brief (Gov't Br. 16), that question turns on whether "any state of facts reasonably may be conceived" to justify the classification (*Sullivan v. Stroop*, 496 U.S. 478, 485 (1990))—an issue that respondents do not directly address until page 42 of their brief.<sup>3</sup> Because the proper application of that standard of review is central to the correct disposition of the question presented, however, we address respondents' treatment of that matter first.

1. a. Respondents do not explicitly dispute that the rational basis for a statute need not appear in either a legislative or administrative record; rather, they contend (Resp. Br. 46-47) that the court of appeals adhered to that principle in this case. As we explain in our opening brief (Gov't Br. 26-29), however, the

<sup>2</sup> As we note in our opening brief (Gov't Br. 2 n.1), the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(c)(4), 106 Stat. 1463, renumbered subsection (6) of 47 U.S.C. 522 as subsection (7). For convenience, we refer to the version in effect when the court of appeals issued its decision in this case.

<sup>3</sup> Respondents instead begin with (Resp. Br. 8-12) an imaginative, but unavailing, argument that Congress acquiesced in the nonfinal, lower court opinion in this case by not responding to it in the Cable Television Consumer Protection and Competition Act of 1992 Pub. L. No. 102-385, 106 Stat. 1460. They then claim (Resp. Br. 12-17) that this Court should pretermitt the question presented in favor of a strict scrutiny analysis never passed on by the court below. From there, respondents devote (Resp. Br. 17-41) a great many pages to the claim that in enacting the Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, the 98th Congress could not really have intended to use the "common ownership" requirement as a rule-of-thumb for identifying smaller facilities less in need of, and less able to absorb, regulation. We address those arguments below.

record belies that claim. Even if respondents' position were consistent with the court of appeals' original decision—which held that "[o]n the record before us, we fail to see a 'rational basis' " for the classification (Pet. App. 34a (emphasis added))—it cannot be reconciled with the court's decision following the remand to the FCC. As discussed in our opening brief (Gov't Br. 27-29), the court refused to credit plausible facts hypothesized by Chief Judge Mikva (Pet. App. 42a-43a) in his opinion concurring in the remand because the court had "no basis for assuming th[em]." *Id.* at 4a. Further, the court would not consider other justifications because the FCC failed to "flesh [them] out" on remand. *Ibid.* The court's refusal to consider plausible justifications because they were unverified on a judicial or administrative record is flatly at odds with this Court's rational-basis decisions. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("the existence of facts supporting the legislative judgment is to be presumed"); *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (court may not reject legislative judgment on the ground that there are not "convincing statistics in the record").

Respondents suggest (Resp. Br. 47-48), moreover, that the legislative history of the Cable Communications Policy Act of 1984 (Cable Act), Pub. L. No. 98-549, 98 Stat. 2779, and FCC regulatory policy (a) identify the use of public rights-of-way as the basis for local jurisdiction over cable facilities, and (b) favor unfettered development of interstate satellite communications. Respondents then argue (Resp. Br. 48) that Section 522(6) is irrational because it does not further those precise interests. Under the rational-basis test, however, a statute need not be justified in

terms of purposes articulated in the legislative history. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("this Court has never insisted that a legislative body articulate its reasons for enacting a statute"); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (finding it "constitutionally irrelevant" whether rational reasons for a classification "in fact underlay the legislative decision"). Nor has this Court ever held that a statute is irrational because an administrative agency has expressed a policy preference different from the one reflected in the statute.

b. Respondents argue (Resp. Br. 42-45) that the "consumer welfare" rationale advanced by Chief Judge Mikva (Pet. App. 43a) and seconded by the FCC (*id.* at 50a) does not support the "common ownership" requirement in Section 522(6). They claim (Resp. Br. 42) that the "common ownership" requirement does not, in practice, constrain the subscriber base of a Satellite Master Antenna Television (SMATV) facility, because a SMATV operator may "install a separate satellite headend facility on the premises of each multiunit dwelling it seeks to serve without obtaining a franchise."<sup>4</sup> For reasons discussed in our opening brief (Gov't Br. 24 n.21), that very consideration *does* support the "consumer welfare" rationale. If a SMATV facility cannot serve separately owned buildings without incurring the cost of installing a separate satellite antenna on each building, it becomes more expensive for a

<sup>4</sup> As the FCC made clear in its rulemaking in this case, "the use of wire or cable within the confines of a multi-unit building is not sufficient to bring the service within the jurisdictional bounds of a 'cable' system." *In re Definition of a Cable Television System*, 5 F.C.C. Rcd. 7638, 7640 (1990).

SMATV operator to serve a large market of separately owned buildings without triggering the statutory franchise requirement of 47 U.S.C. 541(b) (1988).<sup>5</sup>

Respondents next contend (Resp. Br. 43-45) that there is no reason to think that consumers will have more leverage over their cable provider if they all live in dwellings under common ownership, control, or management. In general, however, it is plausible to think that when the "common ownership" requirement is met, the SMATV service is being provided to a smaller group of subscribers by a single owner, who offers it as an amenity to his tenants. Because the group of subscribers is apt to be smaller,<sup>6</sup> and the owner has a strong economic interest in retaining his tenants for reasons quite apart from the provision of SMATV services, it is plausible to assume that owner-supplied SMATV services will tend to be more responsive to the demands of consumers. By contrast, if a SMATV facility serves several separately owned buildings, it is more likely that the facility will be run in the nature of an independent business by the outside operator. In light of these considerations, Congress could reasonably conclude

<sup>5</sup> By contrast, the "common ownership" places an intrinsic constraint on the size of a facility. If a SMATV facility expands to serve dwellings not under the same ownership, that action will itself trigger the franchise requirement.

<sup>6</sup> We recognize, of course, that there will be instances in which some separately owned buildings will constitute a smaller market than some commonly owned buildings. However, as discussed in our opening brief (Gov't Br. 25), a statute may satisfy rationality review even if it is "to some extent both underinclusive and overinclusive." *Vance v. Bradley*, 440 U.S. at 108.

not only that there is less need to regulate facilities that meet the "common ownership" requirement, but also (and concomitantly) that the costs of complying with franchise requirements would result in an undue burden upon smaller facilities who have few subscribers among whom they spread the compliance costs.

In short, respondents' submission suggests no more than that there may be room for disagreement about the precise effects of the "common ownership" requirement upon consumer welfare. What is critical, however, is that under the rational-basis test, "[d]ifferences of opinion" about "the wisdom, need, or appropriateness" of legislation "suggest a choice which should be left where \* \* \* it was left by the Constitution—to the States and to Congress." *Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n*, 313 U.S. 236, 246 (1941) (internal quotation marks omitted).<sup>7</sup>

<sup>7</sup> Respondents also contend (Resp. Br. 26-29, 42) that the "consumer welfare" rationale cannot be sustained because Section 522(6) generally exempts facilities using nonphysical transmission media, irrespective of the size of their subscriber base. As explained in our opening brief (Gov't Br. 28 n.23), the court of appeals adverted to that issue in its first decision (Pet. App. 34a-36a), but declined to reach it following the remand. Pet. App. 3a. It is the usual practice of this Court not to decide questions left unresolved by the courts below, leaving them for the lower courts to address in the first instance on remand. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2437 (1991); *Martin v. OSHRC*, 111 S. Ct. 1171, 1180 (1991); *Sullivan v. Everhart*, 494 U.S. 83, 95 (1990) (due process claims); see also *Leathers v. Medlock*, 111 S. Ct. 1438, 1447 (1991) (reversing state supreme court decision invalidating tax on First Amendment grounds and

2. a. Because Congress in 1984 eliminated the 50-subscriber exemption and similar small subscriber exemptions, respondents maintain (Resp. Br. 22) that it is "inconceivable" that Congress meant to use the "private cable" exemption as a rule-of-thumb to identify smaller cable facilities less in need of regulation.<sup>8</sup>

Respondents' contention is unavailing under settled rational-basis case law. Their argument reduces to the proposition that Congress's actual reason for retaining the "private cable" exemption could not have been to exclude smaller facilities from the regulatory scheme, because that rationale would be inconsistent with Congress's action eliminating the explicit nu-

then remanding case to state supreme court to consider equal protection claim left open below).

In any case, respondents err in arguing (Resp. Br. 27) that Congress's exemption of wireless facilities negates the "consumer welfare" rationale as applied to physically interconnected SMATV facilities; Congress could rationally have concluded that the public interest in promoting wireless technologies outweighed the potential harm of leaving wireless systems unregulated. See Gov't Br. 28 n.23.

<sup>8</sup> Prior to the Cable Act, the FCC's cable regulations generally exempted cable facilities serving fewer than 50 subscribers (see 47 C.F.R. 76.5(a)(1) (1983)) and selectively exempted facilities from specific regulatory requirements on the basis of the number of subscribers. See, e.g., 47 C.F.R. 76.67(f) (1983) (exempting systems with fewer than 1000 subscribers from sports blackout rules); 47 C.F.R. 76.95(b) (1983) (providing that rules requiring nonduplication of network programming within a market do not apply to cable systems serving fewer than 1000 subscribers); 47 C.F.R. 76.305(a) (1983) (record-keeping requirements apply only to cable systems with 1000 or more subscribers); 47 C.F.R. 76.601(f) (1983) (exempting systems under 1000 subscribers from certain technical standards).

merical exemptions. Applying the rational-basis test, however, is not an exercise in determining the actual intent of the legislature that enacted a law. “Where \* \* \* there are plausible reasons for Congress’ action, [judicial] inquiry is at an end,” and [i]t is \* \* \* ‘constitutionally *irrelevant* whether this reasoning in fact underlay the legislative decision.’” *Fritz*, 449 U.S. at 179 (quoting *Flemming v. Nestor*, 363 U.S. at 612) (emphasis added). Thus, for present purposes, the actual reason the 98th Congress retained the “private cable” exemption is immaterial; what is crucial is that a state of facts—in this case, relating to consumer welfare—“reasonably may be conceived” to justify the classification at issue. *Sullivan v. Strop*, 496 U.S. at 485.

In any case, we disagree with the inference drawn by respondents with respect to the deletion of the numerical exemptions. As we note in our opening brief (Gov’t Br. 22-23), the FCC in 1978 explained that a similar rationale underlay *both* the 50-subscriber exemption and the “private cable” exemptions then contained in its rules. See *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 726 (1978) (“[W]e have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can safely be ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively establishes certain maximum size limitations.”).

In view of the partially overlapping purpose of those exemptions, it is at least equally plausible, and far from “inconceivable” (Resp. Br. 22), that Congress deleted the express numerical exemptions in the 1984 Cable Act because the “private cable” exemp-

tion would serve as a sufficient basis for exempting small cable facilities. Indeed, given the lengthy history of the numerical exemption for facilities serving fewer than 50 subscribers (see Gov’t Br. 5 n.4), and the Commission’s targeted use of numerical exemptions from specific regulatory requirements (see note 8, *supra*), it would be surprising if Congress, in enacting the Cable Act, intended to eliminate the substance of any exemption aimed at relieving smaller facilities from regulation.

b. Respondents also maintain (Resp. Br. 23-25) that the FCC’s pre-Cable Act “private cable” exemption does not support the rationality of Congress’s adoption of that exemption. In particular, they argue that the “private cable” exemption had nothing to do with the size of the facilities exempted, but was designed to exempt Master Antenna Television (MATV) facilities—more passive entities that use rooftop antennae to receive off-the-air programming and supply it to the residents of an apartment building.

For several reasons, respondents’ reliance on pre-Cable Act FCC precedent is misplaced. First, this Court has never held that a statute’s rationality must be reflected in pre-existing agency precedent. And any such requirement would contravene this Court’s precedents holding that a statute’s rationality must be sustained if “any state of facts reasonably may be conceived” to justify the statute. *Sullivan v. Strop*, 496 U.S. at 485. Second, although the “private cable” exemption was originally intended to cover MATV facilities, the FCC indicated prior to the passage of the Cable Act that the exemption also applied to SMATV facilities—the very entities at issue here. See *In re Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1224 n.3 (1983), *aff’d sub nom. New*

*York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

Third, pre-Cable Act precedent supports the factual premises of the "consumer welfare" rationale. In the pertinent decisions, issued in the mid-1970s, the FCC considered whether to limit the "private cable" exemption to facilities serving fewer than 1000 subscribers. *Notice of Proposed Rule Making in Docket No. 20561*, 54 F.C.C.2d 824, 834-835 (1975). In rejecting that proposal, the FCC made clear that the "private cable" exemption was justified, in part, because it tended to describe smaller facilities serving a single apartment house or complex whose management offered MATV service as an amenity to the tenants. See *First Report & Order in Docket No. 20561*, 63 F.C.C.2d 956, 996-997 (1977).<sup>9</sup> There is no reason to question the plausibility of the underly-

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<sup>9</sup> In particular, the Commission noted that "only a very small percentage of apartment buildings exceed 500 units in size" and that a MATV provider, in practice, "possesses only the limited economic base represented by the several hundred subscribers within the four walls of a highrise facility." *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 996. In rejecting a motion for reconsideration, moreover, the FCC emphasized that the "multiple unit dwelling indicia" (which included the "common ownership" requirement, 47 C.F.R. 76.5(a)(2) (1977)) "effectively establishe[d] certain maximum size limitations." *Memorandum Opinion & Order in Docket No. 20561*, 67 F.C.C.2d 716, 726 (1978). Respondents argue (Resp. Br. 26) that it is unclear whether that discussion related only to facilities that served units under common ownership or whether it also might pertain to MATV facilities serving separately owned units. Because the FCC's discussion arose in the context of considering whether to modify an exemption that applied only to facilities serving commonly owned, controlled, or managed multiple-unit dwellings, respondents' contention is unpersuasive.

ing premise of those FCC precedents—as applied to SMATV facilities that satisfy the "common ownership" requirement. When cable service is provided as an amenity by the owner of a single commonly owned building or building complex, it is reasonable to assume that regulation is both less necessary and more burdensome than in the case of traditional cable facilities or SMATV facilities serving separately owned buildings.<sup>10</sup>

3. Respondents claim (Resp. Br. 33-39) that, in any event, the more relevant pre-Cable Act FCC

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<sup>10</sup> The 1977 amendment of the FCC rules also supports the "consumer welfare" requirement in another respect. Beginning in 1972, a cable system could not obtain a "certificate of compliance" necessary to commence operations unless the system had a local franchise that met federal specifications. See *Cable Television Report & Order*, 36 F.C.C.2d 143, 219 (1972) (local franchise requirements included public inquiry into operator's qualifications and construction plans; award of franchises of reasonable duration; and provision for consumer complaint procedures). In the 1977 proceeding, the Commission exempted cable systems with fewer than 500 subscribers from its franchise requirements. In so doing, the FCC reasoned not only that franchise obligations were "unduly burdensome for smaller systems," but also that "the combined smallness and localized nature of a system of this size \* \* \* generally [gives] assurance of responsiveness to subscribers' complaints and wishes." *First Report & Order in Docket No. 20561*, 63 F.C.C.2d at 988. Although the Commission soon thereafter eliminated the local franchise requirement altogether (see *Report & Order in CT Docket No. 78-206*, 69 F.C.C.2d 697, 703, 710 (1978) (eliminating "certificate of compliance" requirement); *Report & Order in Docket No. 21002*, 66 F.C.C.2d 380, 391-394 (1977)), the FCC's rationale for the intermediate step of adopting a small-subscriber exemption in 1977 further corroborates the plausibility of the "consumer welfare" rationale for the "private cable" exemption.

precedents were those that preempted local regulation of cable facilities crossing public rights-of-way, while permitting local regulation of cable facilities not crossing public rights-of-way. In respondents' view, those pre-Cable Act precedents suggest that Congress in 1984 actually meant to impose local regulation only upon facilities using public rights-of-way, but "unwittingly caught a different kind of fish in the regulatory net." Resp. Br. 41.

As discussed (see p. 8, *supra*), as long as there are "plausible reasons" (*Fritz*, 449 U.S. at 179) for the distinction at issue, it is inconsequential (for purposes of the Act's constitutionality) whether the Cable Act has effects that Congress may not have specifically contemplated. In any case, we disagree with respondents' assertion that Congress did not intend Section 522(6) to reach facilities that do not cross public rights-of-way, even if they serve separately owned buildings. "Congress' intent is 'best determined by [looking to] the statutory language that it chooses.'" *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985)). And as the court of appeals correctly held (Pet. App. 20a-21a), in enacting Section 522(6)(B), Congress selected unambiguous language exempting facilities that "serve[] only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management" and that forgo "use[] [of] any public right-of-way." 47 U.S.C. 522(6)(B) (1988).<sup>11</sup> Particularly in light

<sup>11</sup> Under respondents' reading of Congress's intent, the "common ownership" requirement would become wholly nugatory, contrary to settled canons of statutory construc-

of the fact that Congress based Section 522(6)(B) upon a well-established regulatory exemption that had long included a "common ownership" requirement (see 47 C.F.R. 76.5(a)(2) (1983)), Congress's retention of that requirement was not, as respondents urge, a mere oversight.

Finally, as we explain in our opening brief (Gov't Br. 36), it is one thing to say that the crossing of public rights-of-way was a traditional justification for local cable franchising, and quite another to conclude (as respondents would) that the crossing of public rights-of-way is the *only* conceivable basis for cable franchising distinctions. While an administrative agency may not depart from its prior precedents under an unchanged statute without giving a reasoned explanation (see *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)), this Court has never held that Congress must offer any such explanation when it amends its own statutes, much less when it adopts a regulatory approach different from prior administrative practice. As noted in our opening brief (Gov't Br. 37), even aside from the use of public rights-of-way, Congress assuredly has a constitutionally sufficient interest in assigning local authorities power to engage in measures such as rate regulation, consumer

tion. See, e.g., *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (courts should "give effect, if possible, to every clause and word of a statute"). Respondents cite (Resp. Br. 39-40) various legislative reports and floor statements to support their contention that public rights-of-way should be the sole determinant of local regulation. But as this Court has emphasized, "[l]egislative history is irrelevant to the interpretation of an unambiguous statute." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 n.3 (1989).

protection, and the like. See, *e.g.*, 47 U.S.C. 543, 552 (1988). In short, even if Congress departed from the FCC's traditional approach to public rights-of-way, such a departure would have no bearing on the rationality of Section 522(6) (B).<sup>12</sup>

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<sup>12</sup> We do not think that Congress in fact departed from FCC precedents. Although respondents emphasize that the FCC preempted local regulation of cable facilities that did not cross public rights-of-way, the Commission *never* preempted local regulation of the subset of SMATV systems that served separately owned buildings by wire. Indeed, when the FCC preempted local regulation of SMATV systems that did not cross public rights-of-way, it was careful to emphasize that only "SMATV systems serving one or more multiple unit dwellings under common ownership, control or management \* \* \* are the subject of this proceeding." *In re Earth Satellite Communications, Inc.* 95 F.C.C.2d 1223, 1224 n.3 (1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). Thus, the Commission's pre-Cable Act SMATV precedents simply do not speak to whether the FCC would have preempted local regulation of the SMATV facilities at issue here.

In addition, there is little possibility that Congress assumed that in adopting the "private cable" exemption, it was embracing an exemption that applied whenever a facility did not cross any public rights-of-way. In several decisions in the mid-1970s, the FCC declined to apply the "private cable" exemption even though a cable facility was located entirely on private land and crossed no public rights-of-way. See, *e.g.*, *In re Citizens Dev. Corp.*, 52 F.C.C.2d 1135, 1137 (1975) (private community development); *In re Bayhead Mobile Home Park*, 47 F.C.C.2d 763, 763-764 (1974) (mobile home park located on private land). At the time, moreover, a "cable television system" was required under FCC rules to obtain a franchise before it could obtain a "certificate of compliance" and begin operations. See 47 C.F.R. 76.31(a) (1975); see also 47 C.F.R. 76.11(a) (1975) ("certificate of compliance" requirement). Accordingly, as *Bayhead* illus-

4. Respondents contend (Resp. Br. 8-12) that the issue presented for review is moot because Congress was made aware of the court of appeals' decision, but did nothing to amend Section 522(6) or to defend the "common ownership" requirement when it passed the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460.<sup>13</sup> The inference that respondents would have this Court draw from congressional inaction cannot be sustained.

Respondents' contention rests (Resp. Br. 9 n.6) on this Court's precedents holding that when Congress substantially amends a statute without altering a particular provision, that may be evidence of legislative intent to embrace the prevailing judicial interpretation of that provision—particularly if it is "a long-standing and well-known" interpretation. *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2213 (1992); see, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-382 (1982).<sup>14</sup>

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trates, because the availability *vel non* of the "private cable" exemption could determine a facility's status as a "cable television system," it was directly relevant to whether the franchise requirement applied. See 47 F.C.C.2d at 764-765.

<sup>13</sup> Respondents' argument is not properly labeled a mootness argument in the Article III sense, because there remains a case or controversy over respondents' claim for relief. More precisely, respondents argue that they are entitled to judgment because Congress acquiesced in the lower court decision in this case.

<sup>14</sup> In general, this Court has admonished that congressional inaction "lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

But the implicit premise of those cases—that in the course of otherwise thoroughly amending a statute Congress would likely alter a settled interpretation with which it disagrees—has no application in the case of a constitutional ruling.

In statutory cases, of course, “Congress may alter what [the courts] have done by amending the statute. In constitutional cases, by contrast, Congress lacks this option, and an incorrect or outdated precedent may be overturned only by [judicial] reconsideration or by constitutional amendment.” *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989). Because the court of appeals held Section 522(6) unconstitutional on its face, it is difficult to perceive what purpose would have been served by Congress’s expressing its disagreement with the court of appeals’ opinion. Congress’s failure to act therefore cannot give rise to any persuasive inference of acquiescence in the result below.

Respondents argue (Resp. Br. 11 n.8) that Congress should have responded to the court of appeals’ decision by “reenact[ing] the current provision and, in the legislative history, articulat[ing] a justification for the exemption at issue, rather than leaving it for the parties and this Court to conceive of one.” That argument is inconsistent with this Court’s cases applying the rational-basis test. For the reasons discussed (see pp. 3-4, *supra*), Congress had no duty in 1984 or in 1992 to give reasons for the distinction drawn in Section 522(6). And its failure to do so in 1992 cannot, consistently with the rational-basis test, be understood to reflect congressional acquiescence in a nonfinal lower court decision holding Section 522(6) irrational. Indeed, because Congress passed the 1992 Act during the period in which the court of appeals’

ruling remained subject to further review (and after the Solicitor General authorized a petition for a writ of certiorari), it is at least equally plausible to infer that Congress’s failure to amend Section 522(6) reflects its *nonacquiescence* in the lower court’s ruling in this case.

5. Respondents argue (Resp. Br. 12-17) that this Court should apply heightened scrutiny in analyzing whether Section 522(6) satisfies equal protection principles, because the classification at issue affects First Amendment interests. The court of appeals, however, did not reach the issue, because it invalidated Section 522(6) on rational-basis grounds.<sup>15</sup> It is the usual practice of this Court not to consider an issue not passed on by the court of appeals, leaving it for the court of appeals to address the issue in the first instance on remand. See, *e.g.*, cases cited in note 7, *supra*.

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<sup>15</sup> As discussed in our opening brief (Gov’t Br. 9 n.12), respondents contended in the court of appeals that applying the Cable Act’s franchise requirements to their operations violated the First Amendment, but the court of appeals found that claim unripe. See Pet. App. 25a-31a. At the same time, however, the court concluded that respondents’ rational-basis challenge to Section 522(6) was ripe for immediate consideration. Pet. App. 32a-33a. In its initial decision, remanding the case to the FCC to provide a rational basis, the court noted that if the Commission was able to “furnish a ‘rational basis,’ \* \* \* we will need to consider whether a heightened-scrutiny equal protection challenge is ripe. For now, however, we need not address the ‘fundamental rights’ claim, because the ‘rational basis’ claim is ripe and apparently valid.” Pet. App. 32a. Because the court invalidated Section 522(6) on rational-basis grounds following the remand, it had no occasion to consider any aspect of respondents’ heightened-scrutiny equal protection challenge.

In our view, remanding the case to the court of appeals to consider issues relating to a heightened-scrutiny equal protection claim is the proper course here. In light of its disposition of this case, the court below did not even address the ripeness of the heightened-scrutiny equal protection claim, much less the merits of that claim. In addition, respondents base (Resp. Br. 14-15) much of their claim of ripeness on the effects of the Cable Television Consumer Protection and Competition Act of 1992, which was enacted after the court of appeals issued its decision and was, accordingly, never before the court. In view of the complexity of both the statutory scheme and the constitutional issues relating to the validity of the cable legislation,<sup>16</sup> we believe that issues relating to the appropriateness of heightened scrutiny should be left for consideration, in the first instance, by the court of appeals on remand.<sup>17</sup>

<sup>16</sup> Many of the provisions of the 1992 Act are currently the subject of challenge in district court. See *Time Warner Entertainment Co., L.P. v. FCC*, Civ. No. 92-2494 (D.D.C.). In addition, Congress has specified that any challenge to the "must carry" rules of the 1992 Act (see §§ 4, 5, 106 Stat. 1471-1481)—upon which respondents heavily rely (see Resp. Br. 14)—must be heard in a three-judge district court convened pursuant to 28 U.S.C. 2284. § 23, 106 Stat. 1500. Presently, an action challenging the "must carry" rules is pending in a three-judge district court in the District of Columbia. See *Turner Broadcasting System, Inc. v. FCC*, Civ. No. 92-2247 (D.D.C.). The pendency of those actions makes it particularly inappropriate to entertain respondents' claims relating to the 1992 Act in the first instance in this Court.

<sup>17</sup> We believe that it is inappropriate to apply heightened scrutiny to test the validity of the classification between cable facilities serving commonly owned, rather than separately owned, buildings. As this Court recently held, when a statute assigns distinct burdens to different First Amendment speak-

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For the foregoing reasons and those given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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ers, there are three types of concerns that trigger First Amendment scrutiny. See *Leathers v. Medlock*, 111 S. Ct. 1438, 1442-1445 (1991). First, if the statute singles out the press for a burden not shared by nonmedia organizations, the classification is suspect. *Id.* at 1443-1444. That concern is not implicated by respondents' claim that the Cable Act impermissibly distinguishes between different categories of cable operators. Second, if a statute singles out a small number of speakers for the imposition of a burden, the statute is suspect because of the "danger of censorship." *Id.* at 1444. The facilities run by respondents, however, are subject to the same burdens shared by all traditional cable operators, thus eliminating any danger of a "narrow targeting" (*id.* at 1443) of certain speakers. Third, if the disparate burden is imposed because of the content of the speaker's speech, then the classification is constitutionally suspect. *Ibid.*; see *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (allowing picketing only for labor disputes); *Carey v. Brown*, 447 U.S. 455 (1980) (same). Because nothing in the record suggests that the material communicated by SMATV facilities serving commonly owned buildings "differs systematically in its message" (*Leathers*, 111 S. Ct. at 1445) from the material communicated by facilities serving separately owned buildings, content-based discrimination is not an issue here. Thus, even if we assume that the First Amendment protections for speakers fully apply to respondents here, there is no reason to apply heightened scrutiny under the equal protection component of the Due Process Clause, because the classification at issue would not be suspect under the First Amendment. Cf. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2543 n.4 (1992).